



## DEPARTMENT OF DEFENSE

### Office of the Secretary

[Docket ID: DoD–2021–OS–0101]

#### Manual for Courts-Martial; Proposed Amendments

**AGENCY:** Joint Service Committee on Military Justice (JSC), Department of Defense (DoD).

**ACTION:** Notice of availability of proposed amendments and public meeting.

**SUMMARY:** The Department of Defense requests comments on proposed changes to the Manual for Courts-Martial (MCM), United States (2019 ed.). The proposed changes are based on certain recommendations of the Independent Review Commission on Sexual Assault in the Military and concern: an amendment to provision in the Manual for Courts-Martial governing the employment of expert witnesses; and amending the Manual for Courts-Martial to establish a universal standard of proof to be applied to nonjudicial punishment proceedings. The approval authority for these changes is the President. These proposed changes have not been coordinated within the Department of Defense under the DoD Directive governing the preparation, processing, and coordination of Executive Orders, and do not constitute the official position of the Department of Defense, the Military Departments, or any other Government agency.

**DATES:** Comments on the proposed changes must be received no later than **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. A public meeting to receive comments concerning the proposed changes will be held on November 10, 2021, at 10:00 a.m. in the United States Court of Appeals for the Armed Forces building, 450 E Street, NW, Washington DC 20442-0001.

**ADDRESSES:** You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Mail: DoD cannot receive written comments at this time due to the COVID-19 pandemic.

Comments should be sent electronically to the docket listed above.

JSC Portal: <http://jsc.defense.gov/Contact>. Follow the instructions for submitting comments.

*Instructions:* All submissions received must include the agency name and docket number for this Federal Register document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Lieutenant Colonel Joshua B. Nettinga, U.S. Air Force, Executive Secretary, JSC, (240) 612-4820, [joshua.nettinga@us.af.mil](mailto:joshua.nettinga@us.af.mil). The JSC website is located at <http://jsc.defense.gov>.

**SUPPLEMENTARY INFORMATION:**

The full text of the 2019 MCM is available electronically at <https://jsc.defense.gov/Military-Law/Current-Publications-and-Updates/>.

This notice is provided in accordance with DoD Instruction 5500.17, “Role and Responsibilities of the Joint Service Committee on Military Justice (JSC),” February 21, 2018.

The JSC invites members of the public to comment on the proposed changes; such comments should address specific recommended changes and provide supporting rationale.

This notice also sets forth the date, time, and location for a public meeting of the JSC to discuss the proposed changes, as shown in the DATES section of this notice.

This notice is intended only to improve the internal management of the Federal Government. It is not intended to create any right or benefit, substantive or procedural, enforceable at law by any party against the United States, its agencies, its officers, or any person.

Dated: October 13, 2021.

**Aaron T. Siegel,**

*Alternate OSD Federal Register Liaison Officer,*

*Department of Defense.*

## ANNEX

### **Section 1. Part II of the Manual for Courts-Martial, United States is amended as follows:**

#### **(a) R.C.M. 703(d) is amended as follows:**

*“(d) Employment of expert witnesses and consultants.*

~~(1) *In general.* When the employment at Government expense of an expert witness or consultant is considered necessary by a party, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. The request shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment.~~

~~(2) *Review by military judge.*~~

~~(A) A request for an expert witness or consultant denied by the convening authority may be renewed before the military judge either after referral of the charges before the military judge who shall determine—~~

~~(i) in the case of an expert witness, whether the testimony of the expert is relevant and necessary, and if so, whether the Government has provided or will provide an adequate substitute; or~~

~~(ii) in the case of an expert consultant, whether the assistance of the expert is necessary for an adequate defense.~~

~~(B) If the military judge grants a motion for employment of an expert or finds that the Government is required to provide a substitute, the proceedings shall be abated. In the absence of advance authorization, an expert witness may not be paid fees other than those to which they are entitled under subparagraph (g)(3)(E).~~

(1) *Experts for the prosecution.* When the employment of a prosecution expert witness or consultant is considered necessary, counsel for the government shall, in advance of employment of the expert, and with notice to defense, submit a request for funding of the expert in accordance with regulations prescribed by the Secretary concerned.

(2) *Experts for the defense.* When the employment of a defense expert witness or consultant is considered necessary, the defense shall submit a request for funding of the expert in accordance with regulations prescribed by the Secretary concerned.

(A) After referral of charges, a denied request for an expert witness or consultant may be raised before the military judge. Motions for expert consultants may be raised ex parte. The military judge shall determine—

(i) in the case of an expert witness, whether the testimony is relevant and necessary;

(ii) in the case of an expert consultant, whether the assistance is necessary for an adequate defense.

(B) If the military judge grants a motion for employment of a defense expert, the expert or an adequate substitute shall be provided in accordance with regulations prescribed by the Secretary concerned. In the absence of advance authorization, experts may not be paid fees other than those to which they are entitled under subparagraph (g)(3)(E).

**Section 2. Part V of the Manual for Courts-Martial, United States is amended as follows:**

**¶1.f.(4) is amended as follows:**

(4) *Statute of limitations.* Except as provided in Article 43(c) and (d), nonjudicial punishment may not be imposed for offenses which were committed more than 2 years before the date of imposition, unless knowingly and voluntarily waived by the member. *See* Article 43(e) (b)(3).

**¶1.h. is amended as follows:**

h. Applicable standards. The burden of proof to be utilized by commanders throughout the nonjudicial punishment process shall be a preponderance of the evidence. ~~Unless otherwise provided, the Service regulations and procedures of the Servicemember shall apply.~~

**¶4.c.(4) is amended as follows:**

(4) Decision. After considering all relevant matters presented by a preponderance of the evidence standard, if the nonjudicial punishment authority—

(A) does not conclude that the Servicemember committed the offenses alleged, the nonjudicial punishment authority shall so inform the member and terminate the proceedings;

(B) concludes that the Servicemember committed one or more of the offenses alleged, the nonjudicial punishment authority shall:

(i) so inform the Servicemember;

(ii) inform the Servicemember of the punishment imposed; and

(iii) inform the Servicemember of the right to appeal (see paragraph 7 of this Part).

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